No. 12668

IN THE

United States
Court of Appeals
For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Supplement to Reply Brief of Appellant

Upon Appeal From the District Court of the United States For the District of Nevada

HON. ROGER T. FOLEY, District Judge

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The Reply Brief of Appellant did not comment on the Brief for Appellee Odermatt because appellant had received neither Odermatt's brief nor any notice that Odermatt had been granted an extension of time within which to file his brief. It was therefore assumed that Odermatt did not intend to file a brief and appellant's reply brief was prepared immediately upon receipt of the Brief for Appellee Standard Oil Company of California. In most respects the contents of the Reply Brief of Appellant can be directed to the Brief for Appellee Odermatt. However, since the latter brief contains some discussion on points not raised by Standard Oil Company of California, and since in at least one respect the appellees are not in the same position, it is believed that a short response to Odermatt's biref should be made as a supplement to the reply brief of appellant.

SUMMARY OF ARGUMENT

I.

Appellee Odermatt is not in a position to contend that he was an independent contractor.

II.

Plaintiff's Requested Instruction No. 1 (Refused) does not assume lack of care or skill on the part of Odermatt or his assistant when regarded in the light of the other instructions.

III.

There is no question in this case as to the proximate cause of the damage to appellant.

IV.

Nielson's absence from the truck was indeed connected with the fire and the destruction of plaintiff's property.

ARGUMENT

I.

Appellee Odermatt is not in a position to contend that he was an independent contractor.

As shown in the Order on Pre-Trial Conference (R. Vol. 1, p. 18), appellee Odermatt admitted that the relationship between himself and Standard Oil Company of California was that of agent or employee, a position opposed that that taken by Standard Oil Company of California. Odermatt cannot now be heard to say, as stated on page 3 of his brief, that the evidence established him as an independent contractor.

II.

Plaintiff's requested instruction No. 1 (refused) does not assume lack of care or skill on the part of Odermatt or his assistant when regarded in the light of the other instructions.

On page 4 of his brief, Odermatt contends that Plaintiff's Requested Instruction No. 1 (Refused) was improper because it assumed lack of skill on the part of Odermatt and his assistant. It is well settled that no one instruction can contain all of the law in any case and that each of the instructions must be regarded in the light of all other instructions, and the Court, by Instruction No. 2 (R. Vol. 1, p. 26) so instructed the jury. The instructions of the Court adequately left the determination of whether or not Odermatt or his assistant exercised ordinary care or skill to the jury. This is particularly true in view of Instructions No. 14, No. 20-A and No. 23. (R. Vol. 1, pp. 33, 40 and 43).

III.

There is no question in this case as to the proximate cause of the damage to appellant.

On pages 10 and 11 of his brief, Odermatt discusses the applicability of the doctrine of res ipsa loquitur to the question of proximate cause. A conclusive distinction exists between the cases cited in the discussion in Odermatt's brief and the situation involved in this case. Appellant here, under the doctrine of res ipsa loquitur, was entitled to an inference that the proximate cause of the fire was some negli-

gent conduct on the part of Odermatt or his assistant. There is and can be no dispute on the question of whether or not the fire was the proximate cause of the damage to the plaintif. The Order on Pre-Trial Conference clearly shows that all parties to the action were in agreement that the fire destroyed the buildings and structures described in plaintif's complaint (R. Vol. 1, pp. 20 and 21). Consequently, the proximate cause of the damage to plaintiff was unquestionably the fire.

IV.

Nielson's absence from the truck was indeed connected with the fire and the destruction of plaintiff's property.

On page 14 of his brief Odermatt states that there is not the slightest room for a thought that Nielson's absence from the truck was in any way connected with the fire. Assuming Nielson's testimony to be true, who can say whether or not or how much gasoline oozed out of the hose which, according to Nielson, had been left with the nozzle end elevated and inserted in the filler pipe of the underground tank, and the hose itself placed for some unexplained reason upon the ground. It is particularly difficult to see how the stated position can be taken when it is remembered that the defendants' witness Ryan testified to the effect that he agreed with the standard safety rule that emergency hand extinguishing equipment should be provided and used when needed, and

that having an extinguisher could determine whether a fire was serious or not (R. Vol. II, p. 521).

Also, it is a matter of common knowledge that a fire which when under way cannot be controlled could often be extinguished if a man equipped with an extinguisher were standing by to immediately apply the chemicals before the fire spread. Irrespective of the causative factor in Nielson's absence from the truck, it is obvious that the damage to the appellant might certainly have been prevented had Nielson been, as was his duty, standing by the truck with an emergency hand extinguisher at the first appearance of the fire.

On page 15 of Odermatt's brief are statements to the effect that there is no question either as to whether or not the filling operations were completed or whether or not the truck end of the hose was attached to the truck at the time of the fire. It should be borne in mind that the witness Moseley testified (R. Vol. I, p. 106), in discussing what Nielson did when he came out of the bar room shortly after the fire started, "It appeared to me he was taking the hose off the truck," and on cross examination Mr. Moseley testified (R. Vol. I, p. 138) to the effect that Nielson must have detached the hose from the tank and that he went into the flames and turned off the flowing gasoline.

CONCLUSION

Appellant submits that the plantiff's motion for new trial should have been granted and that the judgment and order appealed from should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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